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**In the Supreme Court of the United States**

OCTOBER TERM, 1984

BRISTOL-MYERS COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION  
IN OPPOSITION

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## **QUESTIONS PRESENTED**

1. Whether, in a proceeding to review findings by the Federal Trade Commission that petitioner had engaged in widespread deceptive advertising, it is consistent with the First Amendment for the appellate court to apply the "substantial evidence" standard of review prescribed by the Federal Trade Commission Act.

2. Whether objectively verifiable advertising claims for non-prescription drugs made without adequate support may constitutionally be prohibited after the Commission has found that they are deceptive because they violate consumers' expectations that such claims are supported.

3. Whether a provision in a cease and desist order that is reasonably related to the violation charged, litigated, and found by the Commission nevertheless is invalid for lack of due process.



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## **OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 738 F.2d 554. The final order and opinion of the Federal Trade Commission (Pet. App. 28a-137a) is reported at 102 F.T.C. 317. The Commission's order denying petition for reconsideration (Pet. App. 138a-144a) is reported at 102 F.T.C. 1325. The initial decision of the administrative law judge (Pet. App. 145a-515a) is reported at 102 F.T.C. 21.

## **JURISDICTION**

The judgment of the court of appeals was entered on June 25, 1984. A petition for rehearing was denied on July 26, 1984 (Pet. App. 27a). The petition for a writ of certiorari was filed on October 23, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).



## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent portions of the First and Fifth Amendments to the Constitution and of Section 5 of the Federal Trade Commission (FTC) Act, 15 U.S.C. 45, are set forth at Pet. 2.

### STATEMENT

1. Petitioner Bristol-Myers Company (Bristol) manufactures, sells and distributes a number of non-prescription (over-the-counter) internal analgesic drugs, including Bufferin and Excedrin. The Commission found that for more than a decade Bristol's advertising misrepresented the safety and efficacy of Bufferin and Excedrin and was deceptive; these findings were sustained by the Second Circuit (Pet. App. 3a-5a, 37a-38a, 114a, 157a-158a).

2. On February 23, 1973, the Commission issued an administrative complaint against Bristol alleging that advertisements for Excedrin, Bufferin, and Excedrin P.M. were unfair and deceptive, and constituted false advertisements, in violation of Sections 5 and 12 of the FTC Act, 15 U.S.C. 45 and 52.<sup>1</sup>

The administrative law judge's (ALJ) initial decision sustained most of the allegations of the complaint. On appeal, the Commission upheld the ALJ's findings that Bristol had engaged in a wide variety of deceptive practices in advertising Excedrin and Bufferin.<sup>2</sup> Specifically, the Commission

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<sup>1</sup>Complaints were also filed on the same day against other companies challenging the advertising for a number of competing non-prescription internal analgesic products, including Anacin and Bayer Aspirin (Pet. App. 2a-3a). Commission orders similar to the present one were upheld on review in those cases. See *Sterling Drug, Inc. v. FTC*, 741 F.2d 1146 (9th Cir. 1984) (Bayer Aspirin); *American Home Products Corp. v. FTC*, 695 F.2d 681 (3d Cir. 1982) (Anacin).

<sup>2</sup>The Commission dismissed complaint allegations concerning Excedrin P.M. because it found that Bristol had not made the challenged claims for that product (Pet. App. 3a).

found that Bristol had misrepresented that the analgesic superiority of Excedrin and Bufferin over competing products was scientifically proven, or "established." Bristol was found to have made seven false and deceptive claims of this nature, concerning both the efficacy and safety of these products (Pet. App. 3a).

In addition, the Commission found that Bristol had claimed, without a reasonable basis, that both Bufferin (a form of buffered aspirin) and Excedrin (a combination of several analgesic ingredients, including aspirin and caffeine) would relieve tension, and that physicians recommend Bufferin more than any other over-the-counter internal analgesic. The Commission held that such unsubstantiated claims were deceptive (Pet. App. 4a).

Finally, the Commission found that Bristol had falsely and deceptively represented that Excedrin and Bufferin did not contain aspirin. Specifically, the Commission found that Bristol deceptively advertised that its products contained "unusual" or "special" ingredients even though the same ingredients are commonly used in other such products. These "special ingredient" claims served to conceal the fact that Bufferin and Excedrin were aspirin-based (Pet. App. 4a-5a).

Faced with this record of violations, the Commission entered a cease and desist order designed to prevent future deceptive advertising of this sort. The Commission determined the provisions of the order to be both directly related to the violations found to exist and reasonably necessary to prevent further violations. In particular, the Commission emphasized, in response to Bristol's petition for reconsideration, that Part III-A of the order<sup>3</sup> was not premised upon

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<sup>3</sup>Part III-A prohibits false claims that an ingredient is unusual or special (Pet. App. 32a).

an alleged violation that had been dismissed, but rather upon advertisements that falsely claimed that Bufferin and Excedrin did not contain aspirin by implying that the analgesic ingredients found in these products were special and unusual (Pet. App. 4a-5a, 111a-122a, 141a-144a).

3. The court of appeals enforced the Commission's order in its entirety (Pet. App. 1a-26a). Concluding that the prior substantiation doctrine was constitutional, the court reasoned that unsubstantiated claims could be prohibited as deceptive in light of the Commission's holding that consumers expected Bristol's drug claims to have adequate support (Pet. App. 14a-15a). The court also held that Part III-A of the order was reasonably related to Bristol's violation of misrepresenting that Bufferin and Excedrin did not contain aspirin, even though the Commission had resolved certain other "unusual or special ingredient" claims in Bristol's favor (*ibid.*).

#### ARGUMENT

Bristol does not contest the Commission's findings that it engaged in widespread deceptive advertising. Instead, in an argument not raised below, Bristol challenges the constitutionality of the standard of review required under the FTC Act. That standard has long been accepted by this Court and the courts of appeals and fully comports with the decisions of this Court regarding deceptive commercial speech. Bristol's remaining challenges to the Commission's order and the advertising substantiation doctrine were carefully considered and correctly resolved by the Commission and the court of appeals. These rulings are fully consistent with the decisions of this Court and other courts of appeals. Accordingly, further review is not warranted.

1. Bristol makes a new argument, not raised before the court of appeals, that the "substantial evidence" standard of review set forth in the FTC Act, 15 U.S.C. 45(c), is unconstitutional when applied in deceptive advertising cases. But it

is the settled practice of this Court that, absent the most extraordinary circumstances, it will refuse to consider questions not asserted or decided in the courts below. *Regents of the University of California v. Bakke*, 438 U.S. 265, 283 (1978); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940). No such extraordinary circumstances exist here.

Not only was this constitutional question not raised below,<sup>4</sup> it has never been considered by any court of appeals. The courts of appeals therefore have had no opportunity to consider the ramifications of applying *Bose Corp. v. Consumers Union of the United States, Inc.*, No. 82-1246 (Apr. 30, 1984), a noncommercial speech case, in the context of deceptive commercial speech.

Consideration of this newly-raised issue is particularly inappropriate here since Bristol's position regarding the unconstitutionality of the "substantial evidence" standard in commercial speech cases, if accepted, would not only overturn the FTC Act, but also would cast a cloud over the Administrative Procedure Act and statutes governing appellate review of the decisions of numerous other agencies, including those that involve securities or commodities fraud. See, e.g., *Steadman v. SEC*, 450 U.S. 91 (1981).<sup>5</sup> Thus, on a record in which the issue was neither raised nor

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<sup>4</sup>With the exception of *Bose Corp. v. Consumers Union of United States, Inc.*, No. 82-1246 (Apr. 30, 1984), all of the cases Bristol relies upon were decided well before the review proceeding in this case. *Bose* was decided while Bristol's petition for review was still sub judice, yet Bristol did not bring the *Bose* decision to the attention of the court of appeals under Fed. R. App. P. 28(j), nor did it raise this argument (or cite *Bose*) in its petition for rehearing, filed nearly two months after this Court decided *Bose*.

<sup>5</sup>These statutes prescribe a "substantial evidence" standard of review. See, e.g., *Steadman v. SEC*, 450 U.S. 91 (1981); *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

considered below, this case presents no occasion for this Court to consider a contention with such potentially far reaching consequences.

In any event, Bristol's contention is without merit. Even after limited First Amendment protection was extended to truthful commercial speech by *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), and its progeny, courts reviewing Commission decisions have continued to apply the statutory "substantial evidence" standard in cases involving deceptive advertising.<sup>6</sup> Thus, the courts of appeals have uniformly, albeit implicitly, recognized that the standard of independent appellate review articulated in non-commercial speech cases<sup>7</sup> is neither necessary nor appropriate for reviewing Commission findings of deceptive advertising.

*Bose* itself demonstrates why such a requirement of independent review has not been, and should not be, imposed in cases involving deceptive commercial speech. In non-commercial speech cases, independent appellate review is premised on "the danger that decisions by triers of fact may inhibit the expression of protected ideas." *Bose Corp. v. Consumers Union of United States, Inc.*, slip op. 19 (footnote omitted). This rationale has no application to deceptive advertising cases. As this Court has recognized, there is

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<sup>6</sup>See, e.g., *American Home Products Corp. v. FTC*, 695 F.2d 681, 686 (3d Cir. 1982); *Litton Industries, Inc. v. FTC*, 676 F.2d 364, 368-369 (9th Cir. 1982); *Porter & Dietsch, Inc. v. FTC*, 605 F.2d 294, 300 (7th Cir. 1979), cert. denied, 445 U.S. 950 (1980); *National Commission on Egg Nutrition v. FTC*, 570 F.2d 157, 161 (7th Cir. 1977), cert. denied, 439 U.S. 82 (1978); *Warner-Lambert Co. v. FTC*, 562 F.2d 749, 762-763 (D.C. Cir. 1977), cert. denied, 435 U.S. 950 (1978); *Fedders Corp. v. FTC*, 529 F.2d 1398, 1403 (2d Cir.), cert. denied, 429 U.S. 818 (1976).

<sup>7</sup>See, e.g., *Bose Corp. v. Consumers Union of United States, Inc.*, slip op. 12-25; *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-286 (1964).



little likelihood that accurate commercial speech would be chilled by government regulation of false or deceptive statements. See *Bose Corp. v. Consumers Union of United States, Inc.*, slip op. 18 n.22; *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. at 772 n.24.

The only other justification for requiring independent review is the risk of broadening an unprotected category of speech. See *Bose Corp. v. Consumers Union of United States, Inc.*, slip op. 19. Deceptive advertising is, however, a particularly well-defined area, as well as one in which the Commission has considerable expertise. See, e.g., *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965); *American Home Products Corp. v. FTC*, 695 F.2d 681, 686 (3d Cir. 1982); *Litton Industries, Inc. v. FTC*, 676 F.2d 364, 369 (9th Cir. 1982). Moreover, in determining that such advertising violates the FTC Act, the Commission is required by statute to make specific factual findings. See 15 U.S.C. 45(b). Under these circumstances, the risk that the deceptive speech category will be unreasonably broadened is negligible.

For these reasons, the independent review requirement applied in cases involving non-commercial speech is not warranted in the present context.<sup>8</sup>

2. Bristol acknowledges, as it must, that commercial speech may constitutionally be prohibited if it is false, deceptive, or misleading. *In re R.M.J.*, 455 U.S. 191, 202-203 (1982); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. at 771. It

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<sup>8</sup>This result comports with the Court's repeated recognition that commercial speech is entitled to a lesser degree of protection than non-commercial speech. See, e.g., *Central Hudson Gas & Electric Corp. v. Public Service Commission* 447 U.S. 557, 562-563 (1980); *Friedman v. Rogers*, 440 U.S. 1, 11 n.9 (1979); *Ohralik v. Ohio State Bar Ass'n.*, 436 U.S. 447, 456 (1978).

contends, however, that its concededly unsubstantiated advertising claims — that is, claims made without appropriate support — are not deceptive and therefore are entitled to the First Amendment protection afforded to truthful commercial speech. This factbound argument is contrary to settled law and the record of this case. It was properly rejected by the court of appeals.

Because consumers expect objective advertising claims to be appropriately supported, the failure to disclose the lack of such a “reasonable basis” renders a claim deceptive and misleading.<sup>9</sup> This fundamental principle, which has particular force in connection with health-related claims, has been consistently followed in Commission decisions<sup>10</sup> and has been accepted by the courts.<sup>11</sup>

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<sup>9</sup>See, e.g., FTC Policy Statement Regarding Advertising Substantiation, 49 Fed. Reg. 30999 (1984); nn. 10, 11, *infra*.

<sup>10</sup>See, e.g., *In re Sears, Roebuck & Co.*, 95 F.T.C. 406, 520-521 (1979), *aff'd*, 676 F.2d 385 (9th Cir. 1982); *In re Porter & Dietsch, Inc.*, 90 F.T.C. 770, 866 (1977), enforced as modified, 605 F.2d 294 (7th Cir. 1979), cert. denied, 445 U.S. 950 (1980); *In re National Commission on Egg Nutrition*, 88 F.T.C. 89, 191 (1976), enforced in part, 570 F.2d 157 (7th Cir. 1977), cert. denied, 439 U.S. 821 (1978); *In re National Dynamics Corp.*, 82 F.T.C. 488, 549 (1973), denied in part and remanded in part, 492 F.2d 1333 (2d Cir.), cert. denied, 419 U.S. 993 (1974).

<sup>11</sup>See, e.g., *American Home Products Corp. v. FTC*, 695 F.2d 681, 697 (3d Cir. 1982); *FTC v. Pharmtech Research, Inc.*, 576 F. Supp. 294, 302 (D.D.C. 1983). As the Third Circuit stated in *American Home*, “[f]ailure to disclose that a claim regarding a drug product lacks an appropriate level of support, when such support is nonexistent, is misleading.” 695 F.2d at 697 (emphasis in original). In addition, in sustaining reasonable basis orders, numerous other courts of appeals have implicitly recognized that the failure to possess a reasonable basis constitutes a law violation. See, e.g., *Porter & Dietsch, Inc. v. FTC*, 605 F.2d 294, 305-306 (7th Cir. 1979), cert. denied, 445 U.S. 950 (1980) (substantiation order essentially “prohibits petitioners from making representations unless they are true”); *Jay Norris, Inc. v. FTC*, 598 F.2d 1244, 1249-1250 (2d Cir.), cert. denied, 444 U.S. 980 (1979) (“the obligation \* \* \* impose[d] on Norris is ‘no greater than is required of all advertisers under Section 5’”).

In the present case, the Second Circuit correctly upheld the Commission's specific and detailed findings that Bristol's unsubstantiated claims were in fact deceptive, including its determination that consumers expect drug claims like Bristol's to be adequately supported, and that Bristol's claims were unlawful due to the lack of such support (Pet. App. 14a-15a).<sup>12</sup> Such findings are, of course, "in the very realm of the Commission's greatest expertise — what constitutes deception in advertising. As such the reviewing court must give the Commission's findings 'great weight.' " *Fedders Corp. v. FTC*, 529 F.2d 1398, 1403 (2d Cir.), cert. denied, 429 U.S. 818 (1976) (citation omitted).<sup>13</sup>

Since Bristol's drug claims were properly found to be deceptive for lack of support, they are not entitled to First Amendment protection.<sup>14</sup>

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<sup>12</sup>See, e.g., Pet. App. 84a (the claim " 'Our product works better than aspirin,' \* \* \* implies that the advertiser has at least some measure of support for the claim"); see also Pet. App. 81a n.65, 83a-84a, 117a-118a.

<sup>13</sup>Accord, *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965); *Litton Industries, Inc. v. FTC*, 676 F.2d 364, 369 (9th Cir. 1982). In interpreting advertisements, the Commission may rely on its own reasoned analysis of the advertisements themselves, and need not resort to surveys or consumer testimony. *American Home Products Corp. v. FTC*, 695 F.2d 681, 687-688 n.10 (3d Cir. 1982); *Carter Products, Inc. v. FTC*, 323 F.2d 523, 528 (5th Cir. 1963). Hence, it is within the Commission's expertise to conclude, as it did in this case, that particular advertisements deceptively imply the existence of substantiation or deceptively fail to disclose the lack of substantiation. (There was, however, also expert testimony on this point (C.A. App. 47).

<sup>14</sup>Even were Bristol's unsubstantiated claims not inherently deceptive, they could still be prohibited. Recent decisions of this Court have made it clear that in order to prevent deceptive speech the government may also prohibit commercial speech that, while not invariably false or deceptive, potentially lends itself to falsity and deceit. See *Friedman v. Rogers*, 440 U.S. 1, 15 (1979); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 461-462 (1978). When an advertiser makes claims without regard for whether they are supportable, it is likely many will be false, even if on occasion some are true. Of course, in the present context, unsubstantiated claims may still be made if it is truthfully disclosed that the advertised claim lacks support.



Even had it not made factual findings that unsubstantiated advertising claims are deceptive, the Commission could justifiably have reached this conclusion as a matter of law based solely upon well-established precedent. As we have noted, for more than a decade the Commission has consistently applied, with judicial approval, the principle that unsubstantiated claims are deceptive because they violate consumers' expectations regarding the existence of a reasonable evidentiary basis.<sup>15</sup> The Commission's experience long ago reached the point where, based upon the existing case law and its acknowledged expertise, it could reasonably infer that deception results from unsubstantiated advertising claims.<sup>16</sup>

3. The standards for evaluating Commission action under the Due Process Clause are well-settled and amply demonstrate that Part III-A of the current order does not

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<sup>15</sup>See nn. 10, 11, *supra*. From 1971 through 1982, the Commission issued 21 litigated orders and 126 consent orders involving advertising substantiation. Advertising Substantiation Program: Request for Comments, 48 Fed. Reg. 10471, 10472 (1983).

<sup>16</sup>Bristol contends, relying on the Commission's recent re-evaluation of the advertising substantiation program and a statement made by the Chairman in the context of that re-evaluation, that the Commission lacks sufficient evidence demonstrating that unsubstantiated claims deceive consumers. In making this argument, Bristol completely ignores the Commission's new policy statement, issued at the conclusion of its re-evaluation, reaffirming the validity of the doctrine. See FTC Policy Statement Regarding Advertising Substantiation, 49 Fed. Reg. 30999, 31000 (1984). Based on public comments and staff review, the Commission concluded, *inter alia*, that "Objective claims for products or services represent explicitly or by implication that the advertiser has a reasonable basis supporting these claims." *Ibid.* In other words, contrary to Bristol's assertion, the Commission is clearly satisfied that its conclusion regarding the deceptiveness of unsubstantiated claims is well-founded.

raise any constitutional concerns.<sup>17</sup> Simply stated, a decretal provision does not violate due process so long as it bears a reasonable relationship to the unlawful practices found to exist. *American Medical Ass'n v. FTC*, 638 F.2d 443, 453 (2d Cir. 1980), aff'd by an equally divided court, 455 U.S. 676 (1982); *Brown & Williamson Tobacco Corp. v. Engman*, 527 F.2d 1115, 1120 (2d Cir. 1975), cert. denied, 426 U.S. 911 (1976). Such provisions have consistently been sustained against due process challenges, even where the provision in question had not originally been sought in the complaint, but was subsequently added by the Commission. See *FTC v. National Lead Co.*, 352 U.S. 419, 427, 428-429 (1957); *National Dynamics Corp. v. FTC*, 492 F.2d 1333, 1336 (2d Cir.), cert. denied, 419 U.S. 993 (1974); *S.S.S. Co. v. FTC*, 416 F.2d 226, 229 (6th Cir. 1969); cf. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 392, 394-395 (1965). This Court explained in *National Lead*, 352 U.S. at 427, that:

The emphasis that there was no charge, no evidence, no finding to support the inclusion of the objectionable provision in the order is misplaced. Its insertion was nothing more than a mode of implementation, selected by the Commission, to enforce its findings of violations of the Act.

Bristol contended below that Part III-A, which prohibits false claims that an ingredient is special or unusual, was based on a charge that was dismissed, and hence that there

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<sup>17</sup>Bristol's due process argument should be rejected on the separate ground that it was not raised below. Bristol's position before the court of appeals and the Commission (on reconsideration) was limited to the contention that Part III-A was not reasonably related to any of its violations (Pet. App. 15a, 143a-144a). Now that both tribunals have found to the contrary, Bristol impermissibly seeks for the first time to recast its argument in due process terms.

was no nexus between this provision and any of the violations found (Pet. App. 15a-16a, 143a-144a). In rejecting this contention, the Commission and the court of appeals applied the proper legal standard and correctly concluded that Part III-A was reasonably related to Bristol's violation — uncontested on appeal—of falsely representing that certain of its analgesic products did not contain aspirin (*ibid.*).

Bristol does not, and cannot, dispute that it had a fair hearing with respect to the violation upon which Part III-A is premised. See *FTC v. National Lead Co.*, 352 U.S. at 427; *S.S.S. Co. v. FTC*, 416 F.2d at 229.<sup>18</sup> The charge of misrepresenting aspirin content was expressly alleged in the complaint and was fully litigated before the Commission (Pet. App. 93a-97a, 267a-268a). Since Part III-A was found to be reasonably related to this proven violation, its imposition necessarily comports with due process.

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<sup>18</sup>The cases cited by Bristol are inapposite because, unlike the present case, they are not concerned simply with the remedial order, but rather with situations where the violation charged, *i.e.*, the actual theory of liability, was altered or amended without adequate notice. See *In re Ruffalo*, 390 U.S. 544, 546-547 (1968); *Jaffee & Co. v. SEC*, 446 F.2d 387, 393 (2d Cir. 1971).

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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